

**Health Care and Retirement Corp., Valley View
Nursing Home and Local 285, Service Employ-
ees International Union, AFL-CIO. Cases 1-
CA-28519, 1-CA-28541, and 1-CA-28743**

March 31, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On May 22, 1992, Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions,² and to adopt the recommended Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We agree with the judge's Conclusion of Law that the Respondent suspended and discharged Kelly Croshier in violation of Sec. 8(a)(3) and (1) of the Act because she engaged in union and protected concerted activities. The General Counsel excepts to the judge's inadvertent failure to find in the text of his recommended decision that Croshier's discharge violated Sec. 8(a)(3). We correct this omission.

In adopting the judge's findings regarding Croshier's suspension and discharge, we find it unnecessary to rely on the Respondent's lawful antiunion campaign and its grant of a wage increase to support the judge's conclusion that the Respondent harbored union animus. The wage increase granted by the Respondent was not alleged to be an unfair labor practice and there is insufficient evidence to support an inference that it was evidence of antiunion sentiment. The record contains ample other evidence of animus, including the Respondent's independent violations of Sec. 8(a)(1) and the Respondent's pretextual justification for Croshier's discipline. Member Raudabaugh agrees with his colleagues with respect to their nonreliance on the wage increase to show union animus.

In agreeing with the judge that the Respondent's asserted reason for Croshier's suspension and discharge, i.e., that Croshier filed a report falsely accusing another employee of patient abuse, was pretextual, Members Devaney and Oviatt find it unnecessary to rely on the judge's belief that the rule under which the Respondent assertedly disciplined Croshier was not applicable to reports of patient abuse. Rather, Members Devaney and Oviatt rely on the judge's other findings, including the findings that the Respondent failed to conduct a thorough investigation of the abuse incident and that physical evidence of the abuse existed and was known to the Respondent.

We also agree with the judge that the Respondent violated Sec. 8(a)(1) by discharging Nursing Assistants Susan Huls, Alice Downey, Zerma Van Bramer, and Pamela Parsons for their protected concerted walkout in protest of the unlawful suspension of Croshier. We find merit in the General Counsel's exceptions to the judge's

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Health Care and Retirement Corp., Valley View Nursing Home, Lenox, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 1(d) and (e) and reletter the subsequent paragraphs.

“(d) Telling employees that they were voluntarily terminating their jobs by engaging in conduct that was protected concerted activity.

“(e) Enforcing rules prohibiting solicitation in its facility other than in immediate patient care areas.”

2. Substitute the attached notice for that of the administrative law judge.

failure to find that the Respondent independently violated Sec. 8(a)(1) when it told the group of nursing assistants, in the presence of other employees, including Doug Robertson, that if they left the nursing home they were voluntarily terminating their jobs. *J.E.L. Painting & Decorating*, 303 NLRB 1029 (1991).

We conform the judge's legal conclusions, recommended remedy and notice to his 8(a)(1) finding that the Respondent promulgated an unlawful no-solicitation rule.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE**

**NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their union activities.

WE WILL NOT threaten our employees with blacklisting because they engage in protected concerted activities.

WE WILL NOT threaten employees with discharge for engaging in conduct that is protected concerted activity.

WE WILL NOT suspend and discharge our employees because they engage in protected concerted and union activities.

WE WILL NOT enforce rules prohibiting union solicitation in areas of our facility other than in immediate patient care areas.

WE WILL offer immediate reinstatement to employees Kelly Croshier, Susan Huls, Alice Downey, Zerma Van Bramer, and Pamela Parsons to their former positions of employment, discharging, if necessary, any employees hired to replace them, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL remove from our records any references to our unlawful suspension and discharge of Kelly Croshier and our unlawful discharges of Susan Huls, Alice Downey, Zerma Van Bramer, and Pamela Parsons and notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL make Kelly Croshier, Susan Huls, Alice Downey, Zerma Van Bramer, and Pamela Parsons whole for any loss of pay or other benefits they may have suffered as a result of our unlawful discrimination against them, with interest.

HEALTH CARE AND RETIREMENT CORP., VALLEY VIEW NURSING HOME

Avrom J. Herbster and Cheryl Ann Watson, Esqs., for the General Counsel.

Margaret J. Lockhart, Esq., of Toledo, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Between August 2 and November 22, 1991,¹ Local 285, Service Employees International Union, AFL-CIO (the Union) filed unfair labor practice charges and amended charges against Health Care and Retirement Corp., Valley View Nursing Home (Valley View or Respondent).² Based on these charges, the Regional Director for Region 1 issued a series of complaints in the captioned cases, culminating on November 29 in the issuance of a second order consolidating cases, amendment to consolidated complaint, and order scheduling place of hearing (complaint). The complaint alleges, inter alia, that Respondent has engaged in conduct in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent has filed timely answer to the complaint wherein it has admitted, among other things, the labor organization status of the Union and the jurisdictional allegations.

¹ All dates are in 1991 unless otherwise noted.

² Health Care and Retirement Corp. is the corporate parent of Valley View Nursing Home. To differentiate between the two in this decision, Health Care and Retirement Corp. will be referred to as HCR.

Hearing was held in these matters in Pittsfield, Massachusetts, on December 16–19, 1991, and January 27 and 28, 1992. Briefs were received from the parties on April 27, 1992. Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Lenox, Massachusetts, is engaged in the operation of a nursing home. Respondent has admitted the jurisdictional allegations of the complaint and I find that it is now and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview of the Dispute and the Issues for Determination

HCR operates a number of nursing homes in the United States, including the involved home in Lenox, Massachusetts. Valley View's employees are not unionized though employees at some of HCR's other nursing homes are represented by a union. In or about January, Certified Nursing Assistant Kelly Croshier and some other nursing assistants began seeking to organize the nursing assistants at Valley View. Croshier and the other assistants were unhappy because certain pay raises promised by management had not been given and problems with some of their working conditions, including the amount and availability of medical supplies, had not been addressed to their satisfaction. In an attempt to secure their promised wages, Croshier and the other assistants took a two-pronged approach. In late spring, they filed a series of petitions requesting the raises with each level of Respondent's local management, and ultimately had one of the petitions addressed by a regional official from HCR. At the same time, they approached the Union and sought its help in organizing Valley View's nursing assistants. The Union agreed to help organize not only the nursing assistants, but practically all hourly employees, including the kitchen and laundry employees. In this organizing effort, several meetings were held and the matter was evidently widely discussed among the employees at Valley View, though no authorization cards were distributed. Respondent responded to the organizing campaign with one of its own seeking to discourage the employees from supporting the union effort.

In June, when the pay petitions were being circulated and the organization drive was becoming a matter of common knowledge, HCR brought into Valley View a new administrator, Joyce Brewer, and a new director of nursing, Maryanne Dus. These two women immediately began to inquire among the employees about their real and perceived problems with the nursing home. As a result of these inquiries, the nursing home took a number of steps, including implementing an across-the-board 25-cent-an-hour pay increase,

to address the employees' concerns. The effect of these steps was to dramatically reduce employee interest in the Union. By the end of July, the organizing campaign was stalled and the Union and its strongest supporters at the nursing home, including Croshier, decided to put the campaign on hold because of waning interest. This fact was not known by Respondent at the time, however.

In the last week of July, Croshier, by now a well-known union supporter, allegedly observed another nursing assistant, Kris Robinson, physically abuse a patient. As will be discussed in detail, this is about as serious an occurrence as can arise in a nursing home. Though required by Respondent's rules to report any such incident immediately, Croshier waited a day to report the incident, which resulted in the immediate suspension of the alleged abuser. Respondent's management, primarily Dus, conducted an investigation into the matter and allegedly came to the conclusion that no abuse had in fact taken place. Rather, she determined that Croshier and another employee, Unit Supervisor Susan Patnode, were engaged in a plot to have the alleged abuser discharged. As a consequence of this alleged belief, Respondent recalled Robinson to work and suspended Croshier, with the intent of firing Croshier if further investigation did not clear her.

On the day of Croshier's suspension, most of the other nursing assistants who were working at the time learned of Robinson's return and Croshier's suspension. They became outraged and after a confrontation with Respondent's management, which refused to explain why Robinson had returned and Croshier had been suspended, a number of them walked off the job in protest. As they left, they were told by management that they were voluntarily terminating their employment, and in fact, were terminated as of the time they left the facility. Later in the day, two more nursing assistants joined the job action and were likewise terminated.

Shortly thereafter, two unit supervisors, Patnode and Michele Tower, were allegedly terminated for inciting and supporting the action of the nursing assistants. The General Counsel contends that Croshier was suspended and terminated for engaging in union and other protected concerted activities and not the reasons advanced by Respondent. He also contends that the job action undertaken by the nursing assistants in walking off the job was protected activity and their subsequent discharge for engaging in this activity was unlawful. He makes similar contentions with respect to the alleged discharges of Patnode and Tower. Respondent's position is that Croshier was suspended and discharged for falsifying documents, to wit, giving a false affidavit about observing Robinson commit patient abuse. It further takes the position that the walkout by the nursing assistants was not protected by the Act and that such action calls for automatic discharge under established disciplinary rules. With respect to Patnode and Tower, it takes the position that they are statutory supervisors and not subject to the protection afforded by the Act, and further, that the two women were not discharged, but voluntarily resigned for reasons unrelated to union or other protected concerted activity. Within this broad factual background, the consolidated complaint raises the following issues for determination:

1. Did Respondent, on or about June 9, interrogate employees about their union and protected concerted activity and create the impression that such activity was under surveillance by Respondent?

2. Did Respondent, on or about July 29, threaten employees with discharge and then discharge them for having engaged in protected concerted activity, which included a work stoppage and strike?

3. Did Respondent on or about July 29, indefinitely suspend its employee Kelly Croshier, and thereafter on July 31, discharge her for engaging in union and/or protected concerted activity?

4. Did Respondent, on or about July 30, threaten employees with blacklisting and loss of employment for having engaged in union and other protected concerted activity?

5. Did Respondent, on or about July 31, threaten employees with unspecified reprisals for having engaged in union and other protected concerted activity?

6. Did Respondent, on or about July 31, tell an employee that she could have her job back if she did not engage in protected concerted activities?

7. Did Respondent on or about July 31, discharge its employees Susan Patnode and Michele Tower for engaging in concerted protected activities and making common cause with other employees engaged in concerted protected activities?

8. Are Susan Patnode and Michele Tower supervisors within the meaning of the Act?

9. Did Respondent, on various dates in April through July, interrogate employees about their union and protected concerted activities?

10. Has Respondent, since on or about February 2, promulgated, maintained, and enforced an overly broad no-solicitation rule?³

With two exceptions, these issues will be discussed and decided in the order in which they chronologically arise in the factual context of involved events. The matter of the Respondent's no-solicitation rule and the supervisory status of Patnode and Tower are not affected by these events and will be discussed first.

B. Is Respondent's Rule on Solicitation Unlawful?

The Respondent's employee handbook contains the following rule with respect to the matter of solicitation:

No Solicitation

Solicitation by an employee of other employees is prohibited while either person is on working time. Working time is all time when an employee's duties require that he or she be engaged in work tasks, but does not include meal periods, scheduled breaks, or time before or after a shift. In addition, solicitation is prohibited at all times in immediate patient care areas.

In addition, the following is contained in "HCR Rules for Your Protection," a manual of disciplinary rules applicable to all employees:

TYPE B (SERIOUS)

³ At the outset of the hearing, the General Counsel, with my approval, amended the complaint to allege that Respondent's rule on solicitation was overly broad and unlawful under Sec. 8(a)(1) of the Act.

11. Soliciting or distributing written materials during working time or in any work area or resident care area is not permitted.

In the case of *Heartland of Lansing Nursing Home*, 307 NLRB 152 (1992), the Board expressly approved a finding by the administrative law judge that the identical rule was overly broad and in violation of Section 8(a)(1) of the Act. The judge's finding states:

The Board has established a specific policy covering health care facilities. *Springfield Hospital*, 281 NLRB 643, 665 (1986). This policy requires that such an employer's "ban on employee solicitation be limited to immediate patient care areas." *Eastern Maine Medical Center*, 253 NLRB 224, 226 (1980). The Respondent's rule is not so limited and is presumptively invalid. There has been no showing that union solicitation in working areas of the Respondent's facility which are not immediate patient care areas would either disrupt care or disturb residents. Accordingly, I find that the Respondent's no solicitation rule is overly broad and violates Section 8(a)(1). [307 NLRB at 159-160.]

I concur and make the same finding.

C. Are Respondent's Unit Supervisors Statutory Supervisors?

Section 2(11) of the Act defines a supervisor as one who has

authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such actions, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but would require the use of independent judgment.

To be found to be a statutory supervisor, one only must be shown to independently exercise or have the power to independently exercise one of the enumerated authorities.

A great deal of evidence was adduced in this proceeding on the matter of the supervisory status of Respondent's so-called unit supervisors, the position held by Licensed Practical Nurses Susan Patnode and Michele Tower. The position in question here is the next to last step in Respondent's management hierarchy as it relates to the nursing function. At the top of management is the facility Administrator, who is responsible for the entire facility. Valley View has a capacity of about 140 beds and on average has about 135 to 138 resident patients living there daily. They are housed in three wings, denoted A, B, and C. The facility employs about 116 persons. The unit supervisors and nursing assistants are under the supervision of the director of nurses. Subordinate to this position are some positions which are admittedly supervisory in nature, such as the administrative nurse manager, the patient care coordinator/restorative manager, and staff development coordinator, but are not involved in day-to-day supervision of either the nurses or the nursing assistants. Respondent also has what it calls patient assessment nurses and treatment nurses, positions not related to this discussion. The unit su-

pervisors, who are primarily licensed practical nurses, are responsible for the immediate direction of the nursing assistants. There are three nursing shifts. On the day shift, there are 5 unit supervisors and 12 nursing assistants. On the 3 to 11 p.m. shift, there are 4 unit supervisors and 10 nursing assistants. On the 11 p.m. to 7 a.m. shift, there are two unit supervisors and five to six nursing assistants. They are paid hourly in a range of \$11 to \$12 an hour. The nursing assistants are also paid hourly, at a rate ranging from \$6.75 to almost \$8 an hour.⁴ The only salaried persons in the nursing chain of command are the director of nursing and the facility administrator.

The unit supervisor position has in the past been called a charge nurse position. For whatever reason, HCR has been attempting to change this position from one of ordinary employee to a statutory supervisory position. To this end, it has in the recent past changed the title of the position to that of unit supervisor, issued a detailed written job description which insofar as it speaks to the supervisory function, virtually tracks the language of Section 2(11) of the Act, and has conducted seminars with persons holding the position on supervisory functions. The General Counsel contends that unit supervisors are not statutory supervisors, relying in part on a determination to that effect made by Region 1 in a representation proceeding involving another Massachusetts nursing home operated by HCR.⁵ Additionally, on January 21, 1992, the Board issued its decision in *Health Care & Corp.*, 306 NLRB 63, wherein it came to a similar conclusion in a proceeding involving another nursing home operated by HCR. Although I fully agree with both of these cases on the issue of the supervisory status of the individuals therein involved, I believe the facts adduced on this record require a finding that Respondent's unit supervisors are supervisors within the meaning of Section 2(11) of the Act. I believe that HCR has, at least with Valley View, finally allowed the unit supervisors to independently exercise enough supervisory authority as set out in their job descriptions to qualify them as statutory supervisors.

The primary function of the unit supervisors is to provide patient care. Respondent has a written job description for this position which runs several pages in length. The majority of the description details the responsibilities of the unit supervisors in the provision of patient care. The job description does confer certain specific powers relating to supervision of the nursing assistants. According to their job description, unit supervisors have the following authority and responsibilities:

- (a) Have authority to assign nursing assistants to patients;
- (b) Recommend and/or prepares revised work schedules;
- (c) Have authority to call in off-duty employees or transfer employees to cover understaffing;
- (d) Have authority to recommend transfers;
- (e) Have authority to direct or re-direct employees;

⁴ As will be discussed in detail in another context, Brewer gave a 25-cent-per-hour pay increase to virtually all hourly employees. Unit supervisors were excluded.

⁵ This proceeding is styled *Mapleview Nursing Home, Inc., Employer and Local 285, Service Employees International Union, AFL-CIO, CLC*, Cases 1-RC-19539 and 1-RC-19541.

- (f) Have authority to evaluate employee performance;
- (g) Recommend and communicates pay adjustments;
- (h) Recommend or communicate promotions;
- (i) Have authority to adjust grievances or make effective recommendations for adjustment of grievances;
- (j) Have authority to discipline or recommend discipline of an employee;
- (k) Have authority to issue, sign and communicate disciplinary actions to employees.
- (l) Have authority to suspend, suspend subject to discharge, layoff or recall employees or effectively recommend these actions;
- (m) Participate in recruiting or referring, interviewing, screening and/or hiring employees;
- (n) Responsible for orientation and/or training new employees;
- (o) Responsible for informing employees of new policies and procedures;
- (p) Have authority to release employees from immediate work assignments; and,
- (q) Have authority to approve time cards or overtime.

It is clear from the evidence that unit supervisors at Valley View, their job descriptions notwithstanding, do not have the authority to hire, fire, or lay off nursing assistants. The powers or authority represented by items a, b, c, i, p, and q have already been considered by the Board in *Health Care Corp.*, supra, under facts relating to such items which are almost identical to those adduced herein. The degree to which the unit supervisors therein exercised the authority given them did not make them statutory supervisors in the view of the Board. The degree to which Respondent's unit supervisors exercise their above-enumerated powers and responsibilities seems to depend to a great extent on the individual unit supervisors desire to do so. The vast majority of a unit supervisor's working time is spent in the provision of patient care, often working hand in hand with the nursing assistants in providing such care. On a daily basis, the unit supervisors assigned nursing assistants to particular patients in a wing. The nursing assistants were assigned to particular shifts and wings by Dory Bard, the administrative nurse manager. Some unit supervisors allowed the nursing assistants to make their own patient assignments, though all retained the authority to change such assignments if they disagreed with them. Some of the unit supervisors seemed to give some thought to such assignments, assigning assistants to groups of patients taking into consideration the patients level of need and the relative skill levels of the assistants assigned to the wing. Others apparently just made the assignments without much thought or, as indicated, let the assistants assign themselves.

If patient needs dictated, the unit supervisors could shift nursing assistants from one wing to another. Similarly, if a shift was short of nursing assistants because of illness or other unscheduled absence of the assistants assigned to the shift, the units supervisors could and did call in other assistants to work. The only apparent limitation on this authority was that the unit supervisor was to try to avoid an overtime situation when selecting the replacement. Otherwise, they could exercise their discretion in who was called in.

Unit supervisors could and did authorize nursing assistants to leave work in emergency situations. They could authorize overtime, though this was reviewed by Bard.

The authority of the unit supervisors to administer discipline somewhat supports a finding that they are statutory supervisors, though not strongly. The unit supervisors are given seminars on employee communication by Respondent, with emphasis on the disciplinary process. They routinely counsel nursing assistants on the manner in which they give patient care, settle disputes between nursing assistants, and write up assistants for violations of work rules or inappropriate behavior, all without the need for any other approval from higher management. Although there was some question raised about the access afforded unit supervisors to the nursing assistant's personnel files, I believe the best evidence supports a finding that they did have access to prior disciplinary notices in the assistants' files. There is no question concerning the authority of the unit supervisors to issue verbal counselings, written counselings, and written warnings to nursing assistants. There is a serious question regarding whether these warnings actually were used in meting out practical discipline such as suspensions and terminations. There were two or three incidents cited in the record to show that unit supervisors can actually discipline nursing assistants to the extent of suspending them, but these cited incidents do not clearly support that proposition. Director of Nursing Maryanne Dus remembered that Unit Supervisor Sue Ann Zank suspended a nursing assistant for one afternoon for insubordination, without any contact with higher management. Zank denied ever suspending anyone, and Dus gave Zank a written counseling for inappropriate action in reference to this incident. Unit Supervisor Joyce Ann Gardner testified that one occasion, she suspended a nursing aide and on another she was in the process of suspending an assistant when the assistant quit. It appears that in the first instance also, the assistant quit before the suspension was effective. Gardner, however, clearly believed she had the power to suspend nursing assistants if such action was called for under Respondent's rules. I believe that at Valley View, the unit supervisors have the authority to recommend discipline, not administer discipline. Perhaps because the director of nursing, Dus, was relatively new at her job during the timeframe for which evidence about supervisory authority was adduced, the evidence does not prove that she followed the disciplinary recommendations of the unit supervisors. Therefore, I do not find that the disciplinary authority of the unit supervisors, by itself, established supervisory status.

However, the authority of unit supervisors to evaluate and reward nursing assistants strongly lends weight to the proposition that they are statutory supervisors. First, the unit supervisors do conduct independent evaluations of the nursing assistants. To do so they utilize a rather elaborate form on which they grade the assistants on an large number of job elements, giving the assistant a grade of 1 to 5 on each element. Adding all the grades and dividing that number by the number of involved elements yields an overall grade of from 1 to 5. Annual pay raises are given in direct correlation with this grade, i.e., from 1 to 5 percent. Though there appears to be an institutional limitation on giving an assistant all fives or all ones, there is no other limitation placed on the evaluations by higher management and there is no intrusion by such management in the evaluation process. Thus, the

level of an assistant's annual salary increase, though as a practical matter only in a range of 2 to 4 percent, is the decision of the unit supervisor. I believe and find that this function constitutes a reward or promotion within the meaning of those terms in Section 2(11) of the Act. The manner in which the evaluations affect the nursing assistants' salaries at Valley View differs markedly from the situations presented in *Mapleview Nursing Home, Inc.*, and *Health Care Corp.*, supra. In *Mapleview*, there was no evidence that the evaluations, on their own, resulted in any personnel action. There, the director of nursing exercised complete discretion in granting or denying wage increases, and alone determined if an employee should receive a wage increase as well as the amount of the increase. In *Health Care Corp.*, the pay level of nursing assistants was based solely on their seniority. Moreover, the nurses in that case were not allowed to completely fill out the annual evaluations of nursing assistants, the matter of the ultimate evaluation being left to the director of nursing, who also presented the evaluation to the involved nursing assistant. At Valley View, the entire appraisal is completed by a unit supervisor, who also presents the appraisal to the nursing assistant and counsels the assistant with respect to matters that need improvement.⁶

On a step-by-step evaluation, I believe that the employee evaluation is the only supervisory criteria which Valley View's unit supervisors were shown to have exercised independently enough to qualify them as statutory supervisors. However, I believe an overview of their authority and position at Valley View will only support a finding that they are statutory supervisors. It is clear from the evidence in this record that higher management views the unit supervisors as supervisors, the unit supervisors view themselves as supervisors, and the nursing assistants view them as supervisors. They represent management in regular meetings they conduct with the nursing assistants and play a significant role in the disciplinary process at Valley View, including documenting the facts surrounding the violation of Respondent's rules by nursing assistants and recommending discipline. They give counseling, which amounts to remedial direction, to nursing assistants, for violation of rules or professional conduct. They do direct the work and immediate work assignments of the nursing assistants, and on occasion, are the only representatives of management on duty at Valley View. In most respects, they perform their duties, including their supervisory duties, without any guidance or interference from either the director of nursing or the facility administrator. The unit supervisors were shown to be the only supervisors of the nursing assistants. In conclusion, I find that the unit supervisors at Valley View were statutory supervisors at all times material to the matters involved in the complaint.⁷

⁶In my view, this power, as well as the degree of authority vested in the unit supervisors to direct the nursing assistants, call in nursing assistants, and adjust their grievances, distinguish this case from the ones cited above as well as from *Beverly Enterprises*, 304 NLRB 861 (1991), *Phelps Community Medical Center*, 295 NLRB 486 (1989), and *Passavant Health Center*, 284 NLRB 887 (1987).

⁷See *Lincoln Lutheran*, 290 NLRB 1077 (1988), *Los Alamitos Medical Center*, 287 NLRB 415 (1987), and *Pine Manor Nursing Center*, 270 NLRB 145 (1984).

D. Discussion of the Events Leading to the Involved Discharges and Allegations of Unlawful Interrogations

As noted earlier, the complaint allegations generally are chronological in nature and fall into two groups, those involving Nursing Assistant Kelly Croshier and certain other assistants, and those involving Susan Patnode and Michele Tower, who I find are statutory supervisors. In this section of my decision, I will primarily discuss the allegations relating to the nursing assistants. In the same timeframe as the suspension and discharge of Croshier and the discharge of the nursing assistants who walked out are certain allegations of unlawful interrogations and statements made by Respondent's management. Most of these actions were directed at Unit Supervisor Michele Tower. As I have found that she is a statutory supervisor, such actions are not unlawful. However, they will be noted as they are evidence of Respondent's interest in and opposition to the unionization of its employees.

In the events which gave rise to the complaint allegations herein, Certified Nursing Assistant (CNA) Kelly Croshier is generally critically involved. Croshier was employed by Respondent as a nursing assistant from March 5, 1990, until her discharge on July 31. Her duties included taking care of the patients, putting them to bed, washing them, feeding them, and generally caring for them. Croshier worked on the 3 to 11 p.m. shift, 40 hours a week. She worked every other weekend. She began her employment making \$6.50 an hour and was earning \$7.01 an hour when she was terminated. Her last annual job evaluation indicates that she is an above-average employee and a caring nursing assistant.

At all times material, until mid-June, Tom Lusa was director of nursing at Valley View and Kathy Fuller was the facility administrator. When Croshier was hired, Administrative Nurse Manager Doris (Dory) Bard told her that she would receive a 10-cent-an-hour pay raise after her 90-day probation period. However, after completing the probationary period, she did not receive the promised raise and was told by Bard that Respondent had discontinued this policy. Croshier and all of the other nursing assistants working at Valley View in late 1990 were given a 75-hour training program by then Training Coordinator Joan Cooper. As a result of this program and a qualifying test, the nursing assistants were certified by the State of Massachusetts in February 1991.

During the certification training program, Croshier and the other nursing assistant trainees were told they would receive a raise upon certification. This promise was made by Cooper, Fuller, and Lusa. This raise was not forthcoming after certification so in monthly meetings with management, Croshier and a number of other nursing assistants asked Fuller and Lusa when they were going to get the raise. The employees were put off and told that management was looking into the matter.

Because they were not getting either the promised postprobationary raise or the certification raise, Croshier and some other nursing assistants prepared a petition dated May 16, requesting the certification raise. This petition, signed by 36 nursing assistants, was presented to Dory Bard and reads as follows:

In a meeting at Valley View Nursing Home on May 9, 1991, between 7:00 p.m. and 8:00 p.m., the nursing

assistants voiced their concerns about pay raises that were promised us.

Most of us hired between January 1990 and October 1990 were promised a pay increase after our ninety day probationary period. As each of us reached the end of our probationary period we inquired about the pay increase and were told that [it] is no longer being given. We were also told by two supervisors that we could all receive an increase after we became certified nursing assistants. The certification was completed recently and now we are being told that no such promise was ever made. We feel we deserve these increases as they were promised to us.

Your immediate attention in this matter will be appreciated.

Croshier's name is the first one listed on this petition. She testified that she put her name first because she was willing to accept any trouble that might result from the petition. On May 17, Croshier handed the petition to Bard, who read it, and returned it, telling Croshier to give it to Lusa. Following this instruction, Croshier slipped the petition under Lusa's office door that evening. The nursing assistants did not hear from Lusa about the petition, but were told a couple of days later that he had read the petition. Thus, five of the assistants, including Croshier, took the petition to Administrator Fuller on May 23. The petition was accompanied by a memorandum that set forth the fact that the petition had first been presented to Bard and Lusa. Fuller had no immediate response to the petition. At a meeting between Fuller and all the nursing assistants about 2 days later, she said she had no answer for them and asked for more time.

Because they were receiving no clear answer, Croshier and Nursing Assistant Pam Parsons called an 800 number listed in the Respondent's employee handbook for employee complaints and received the names of two corporate executives to whom complaints could be directed. These employees were Erl Benson and Jim Millspaugh. Croshier and Parsons then prepared identical letters to these men, which are dated June 13 and which read as follows:

We would like to bring to your attention our concerns regarding wage increases that were promised to the nursing assistants at Valley View Nursing Home in Lenox Massachusetts. Enclosed you will find copies of memo's presented to Doris Bard, day supervisor, Tom Lusa, Nursing Director and Kathy Fuller, Administrator for which we have received no response whatsoever.

Also, it come to our attention that there is one nursing assistant at Valley View that was hired at .25 cents per hour more than anyone hired before or after her. We would appreciate an explanation of why this has happened.

We feel that we have been mislead and are entitled to the pay increases that were promised. Your prompt attention in this matter would be greatly appreciated. Please contact Palmela Parsons or Kelly Croshier [telephone numbers omitted].

In a parallel development, Croshier testified that talk about joining a union began among the nursing assistants in January, when she and Pam Parsons first discussed the subject. The nursing home had been the subject of an unsuccessful

organizing campaign by the United Food and Commercial Workers Union (commonly referred to in this record as the "meat packers union") about a year previously. Croshier asked Unit Supervisor Michele Tower for the name of someone to contact and was referred to Sheri Gimlewicz, the union steward for the Local 285 of the SEIU at a nearby unionized nursing home. Gimlewicz told her that the Union did not want to step on toes and that the employees would have to sign a letter stating they wanted representation by the involved Union rather than the meat packers union.

Following this instruction, Croshier and another employee prepared a letter stating their preference for the Union. This letter was circulated among the nursing assistants and about 34 ultimately signed it. The last few signed at a meeting held on June 8, at a restaurant, the "Five Chairs," located about a block from the nursing home. About 10 employees attended this meeting. At this meeting the matter of the Union was discussed and every one in attendance was for it.⁸

On June 15, Croshier had a picnic at her house to which all Valley View employees, including management, were invited. No management officials came and only a few employees showed up. Those who did were asked to sign a sheet giving their names and addresses for use by the Union. The approximately 13 persons in attendance signed the sheet.

Prior to this picnic, Croshier, Pam Parsons, Sheri Gimlewicz, and an organizer from the Union, Carol Baker, met at the "Luau Hale" restaurant. At this meeting, Baker told the employees about the Union. The Union did not distribute authorization cards and no such cards were ever signed by employees.

Around June 15, Respondent replaced Tom Lusa with Maryanne Dus and Kathy Fuller with Joyce Brewer. At about the same time, Croshier received a phone call from HCR Regional Manager Erl Benson who told her that he had made these replacements and would appreciate having a little more time. She thanked him for responding and the conversation ended.

I find the matter of these replacements interesting to say the least. No real reason was offered by Respondent for the personnel changes and their timing strongly suggests they were prompted by Respondent's desire to defeat the union organization campaign.⁹ The actions of Brewer on arrival

⁸Nursing Assistant Sue Huls testified that following this meeting, she was approached by Unit Supervisor Sue Ann Zank who rhetorically asked, "So the Five Chairs is where Kelly's holding her meetings?" Zank denied this statement; however, I credit Huls' testimony. Huls was an entirely credible witness, whereas Zank was anything but credible. This statement, indicating surveillance by Respondent was alleged to be a violation of Sec. 8(a)(1) of the Act, but was deleted at some stage from the scope of the complaint. I believe it does show that Respondent was interested in the organizing campaign and had correctly identified Croshier as the prime mover in it.

⁹Respondent was obviously aware of the nursing assistants' displeasure over the wage situation because of the pay petitions which had been presented to management. It was clearly aware of the union organizing campaign as well. Patricia Gillette, HCR's human resources manager, was present at Valley View prior to the replacement of Lusa and Fuller and remained until at least after the discharge of the nursing assistants in late July and early August. There is no purpose for her stay at Valley View set forth in the record except to respond to the organizing campaign. Brewer at two points in the record vaguely described Gillette's duties as seeing how

also strongly supports such a view. Brewer came to Valley View from a position as assistant administrator at HCR's Crescent Hill Nursing Home in Springfield, Massachusetts. On her arrival at Valley View, she met with small groups of employees to introduce herself and to get a feel for the condition of the nursing home. She asked each employee that if they could ask for one thing, what would it be? From these conversations, she made a master list of 10 major problem areas and determined what she could do to solve them. The concerns were primarily with supplies, staffing, and wages, with some lesser concerns. She was made aware of the nursing assistants' wage petition by her immediate corporate supervisor, Erl Benson. Following this, she conducted an area nursing home wage survey and found that Valley View's wages were below some of the others. She and Benson decided to give an across-the-board 25-cent-per-hour wage increase to remedy the situation. Dus similarly met with groups of unit supervisors and nursing assistants to determine their wants and needs. As a result of the their meetings with employees, Brewer and Dus also made changes in the manner in which supplies were ordered and made available to the nursing assistants. Staffing problems were determined to be primarily caused by abuse of the call-in procedure and Brewer began strictly enforcing the rules on attendance and filled open positions.

The steps management was taking to answer employee complaints were explained to employees in a series of meeting. At the meeting attended by Croshier, Brewer would not allow questions or comments from the employees. It was pointed out that the raises were not certification raises. This upset Croshier who still felt that management was not keeping its promises with respect to the certification and post probationary period raises.

About June 20, Croshier received another call from Benson. He asked how everyone felt about the raise, and she told him, "Well, we're not giving it back." She characterized her comment as being a "smart ass." According to Croshier, she felt that Benson wanted a thank you, and she did not think he deserved one.

things are going and seeing if the needs of the employees are being met. However, the only concrete examples of her activities while at Valley View are the preparation of two letters dealing with the union organizing campaign and being consulted about the suspension and discharge of Croshier.

Unit Supervisor Michele Tower testified that after the assistants had presented their pay raise petition, she was called in to talk with Fuller, who asked her if the petition had anything to do with union organizing. Tower said she did not think so. Fuller then asked if she had noticed interest in a union among the employees. Shortly thereafter, Tower had another conversation with Fuller in which Fuller stated that she could lose her job if a union got into the nursing home. She again asked what Tower knew about union activity, specifically asking if authorization cards were being circulated. She asked if Tower had been asked to sign a card, and further asked Tower to report the name of anyone signing a card. Fuller did not testify in this proceeding. These interrogations by Fuller are alleged in the complaint as violations of the Act. Were it not for my finding that Tower was a statutory supervisor, I would find them to be violations of Sec. 8(a)(1) of the Act.

Nursing Assistant Sue Huls, a union activist, was told by Fuller that "they are passing out cards from the union and if you sign one, you lose your right to speak with us by yourself."

On about July 2, a letter from Joyce Brewer was distributed to the employees of Valley View. According to Brewer, this letter was prepared by Patricia Gillette and she was told to sign and distribute it. The letter begins by saying, "During the last few weeks, your Department Heads and I have been talking with you about why we do not believe that we need the Service Employees International Union in our facility."¹⁰ It further states that the Union is distributing authorization cards, that the Union can achieve recognition through the signing of such cards, and urges the employees to learn the "FACTS" before signing. It concludes by saying that management will be sharing information with them in the next few weeks and urges any employee with a question about the Union to ask his or her department head or Brewer.

Respondent's admitted statutory supervisor and patient care coordinator, Alison Apple, testified that she was aware in the spring of 1991 that there was some union activity going on among the nursing assistants. She attended meetings of management conducted by Brewer and Dus wherein the union was discussed and supervisors were told what they could say to employees. At one such meeting, Brewer handed out the above letter and told the assembled management that it was up to them if they wanted to distribute the letter. Brewer impressed upon them that the nursing home did not want to have a union. Nursing Assistant Alice Downey credibly testified that Apple asked her if she had heard anything about the Union and whether she was involved with the Union. I mistakenly overruled a motion by the General Counsel to amend the complaint to allege this statement as an unlawful interrogation in violation of Section 8(a)(1). However, as noted Apple testified and denied making the statement. I credit Downey's testimony over that of Apple's as I believe that Apple did not testify credibly over a matter involving the suspension of Croshier. As the matter was fully litigated on the record and as the matter of interrogations is broadly alleged in the complaint, I do find this interrogation unlawful.

Also in late June or early July, Croshier and other employees were required to view an antiunion movie. After the movie, Croshier was approached by Joan Cooper who stated that her husband was in a union and had nothing but problems with the Union. Croshier indicated she was not interested and walked away.¹¹ Management also distributed to the

¹⁰ Although Brewer readily admitted holding meetings with all hourly employees at this time to learn their concerns, she denied meeting with employees and telling them why Respondent did not believe it needed the Union, though her letter clearly states that. Assuming Brewer's denial is the truth, and I cannot find any testimony of employees which would indicate that she directly discussed the matter of the Union with them in meetings in this timeframe, then the letter that her superiors prepared for her signature is false. Her willingness to please her superiors by signing her name to a false statement regarding the union damages her credibility in my mind.

¹¹ Unit Supervisor Tower testified that she was made to watch this film in the Company of Joan Cooper. Tower expressed her concern that the film was inaccurate and one sided. The next day, Tower was called into Dory Bard's office, where Bard told her that Cooper was upset with Tower's comments and felt she was very pronoun. Bard asked if she in fact were pronoun. Tower gave an ambiguous reply. Later that day, Tower was approached by Cooper who said she thought that Tower was pronoun, explaining that during the last organizing campaign at Valley View, friends were pitted against

Continued

employees copies of newspaper articles about the rocky labor relations at the newly organized Edgecombe Nursing Home in Lenox.

In mid-July, at a regular meeting held by the unit supervisors with nursing assistants, Croshier, and other assistants continued to complain about supplies and other problems at the nursing home. Unit Supervisor Susan Patnode told Croshier that if she spoke on her own, she would be fired. However, if the nursing assistants spoke together, they would be safe as there is safety in numbers. Unit Supervisor Karen Zink related her experience at another nursing home and advised the nursing assistants walk out in protest over matters about which they were unhappy or dissatisfied. Unit Supervisor Michele Tower agreed and began singing "United We Stand, Divided We Fall." Unit Supervisor Sue Ann Zank abruptly left this meeting and wrote up a report, which she gave Dus on or about July 29. The report attributes all the these supervisors' statements encouraging organization and walking out as solutions to the assistants' problems to Unit Supervisor Patnode and concludes by saying: "After these statements were made, the staff were ready for action, lets stick together and do it. There was a very negative energy charge and the staff was very loud and angry."

In July, Croshier and a few other nursing assistants, including Alice Downey and Zerna Van Bramer, met with Ben Hensler, another organizer with the Union who replaced Carol Baker. He requested that they get him names and addresses of employees and they complied. The campaign became stalled because the kitchen and laundry employees were not interested. Hensler, later in July, informed Croshier that the campaign was being put on hold, but to continue working on it. Management had no idea that this was the state of the campaign at the time. A letter distributed by Brewer on July 30 clearly indicates that Respondent believed the campaign was still fully underway. What Respondent's management did know was that Kelly Croshier was in the forefront of the organizing campaign. Virtually every witness testifying in this proceeding identified her as a strong union supporter or the point person for the Union.¹²

friends, resulting in broken relationships. She commented that she would hate to see Tower become involved in anything like that. Cooper did not testify in this proceeding. Tower also testified that at about this time, Bard asked if she knew who was involved in the union campaign.

Bard testified that Tower would come to her office every day she worked and let her know about what was going on in the building, including the union activity. She testified that it was possible that she may have asked Tower about the Union after the showing of the film. She denied asking Tower the identities of others who supported the Union. On the other hand, Bard stated that she learned from a housekeeping employee that several nursing assistants were involved, including Croshier, Zerna Van Bramer, and Sue Carpenter. I credit Tower's version of her conversations with Bard over Bard's denials and equivocations. Bard was shown to have engaged in a number of conversations with employees in which the Union was discussed in one respect or another. I consider it highly improbable that all these people made up these conversations. Again, these conversations were alleged to have violated the Act. I find that they did not violate the Act only because of the Tower's status as a supervisor.

¹² Perhaps not surprisingly, Brewer and Dus were reluctant to admit their knowledge about the campaign. Dus was really less than candid in my opinion on this subject. She testified that she was unaware of union activity when she first arrived, that there was no dis-

At this point, the end of July, events at the nursing home took a dramatic turn. Within the period from July 25 to August 1, Croshier would be suspended and discharged and a number of her fellow nursing assistants would be discharged for walking off the job in protest of her suspension. Before beginning a detailed discussion of these events, it must be noted that these events occurred at a time when Croshier was still vocal in her displeasure about the pay situation. She and a number of other assistants were also vocal in their displeasure about the medical and patient care supply situation at the nursing home, even though Brewer and Dus had been addressing these concerns. Gillette was still at the facility overseeing, according to Brewer, whether the nursing assistants' questions and concerns were being addressed, or in my opinion, whether the organizing campaign was being properly addressed. Croshier had been warned by a unit supervisor that she would be fired if she continued in her outspoken complaints, and the assistants had been encouraged by their supervisors to band together and walk out in protest if management did not address their concerns. In this atmosphere of charged emotions and antiunion pressure, the following scenario unfolded.

E. Was Croshier Suspended and Discharged for her Union and Protected Concerted Activity?

In a nursing home, abuse of a patient or resident by an employee is perhaps the most serious charge which can be leveled at an employee. The Respondent has a written policy with respect to patient abuse, which it defines as: Abuse

cussion of a union at that time, and that a unit supervisor told her that there was no current union activity at the facility. She even denied knowing about the nursing assistants' pay raise petition until it was shown to her by a Board agent. Given the fact that Brewer testified that antiunion films were being shown at this time, that Dus' subordinate Dory Bard was inquiring about union activity at this time, and that Alison Apple testified that Dus and Brewer led a management meeting on how to conduct a union campaign at some point before July 2, I seriously question Dus's credibility and her disclaimer of any antiunion motivation.

Similarly, I find Brewer's testimony about her knowledge of union activity to be disingenuous. She admitted knowledge that management, presumably Gillette, was showing a movie to employees when she arrived, but testified that she did not know what the movie was about. She testified that no one talked to her about union activity and she did not overhear anything about union organizing. She denied any knowledge about union activity prior to her taking her new post. Yet, there is no reason given for the personnel change, or why HCR's human resource department was taking such a keen interest in Valley View. The only occurrence that was shown to be out of the ordinary was the submission of the pay petition and the organizing campaign. She admits being asked to sign and distribute the July 2 letter, written by Pat Gillette, shortly after she arrived at Valley View, though she denies the truthfulness of the letter. She ignored the testimony of her patient care coordinator, Alison Apple, that she impressed on her staff the fact that the nursing home did not want a union when giving them the July 2 letter and denies personally passing out the letter to her department heads, including Apple. I believe that Brewer and Dus were installed at Valley View because of the union activity and do not believe their statements to the contrary. I further do not believe their expressed lack of knowledge or interest in such activity. Their lack of candor will be taken into account when making credibility determinations about the facts surrounding the Croshier suspension and discharge and the discharge of the other nursing assistants.

shall be defined as any physical, verbal or other threatening action shown to a resident or acts of neglect or omission which causes injury, loss, harm, or emotional distress to a resident. The policy requires that all acts of abuse shall be immediately reported to a proper authority, and failure to report abuse subjects the witness to the same discipline as the abuser.¹³ Any person accused of abuse is immediately suspended without pay, pending an investigation. The policy states on this point:

The accused employee shall be permitted to return to work only after it has been determined that they are without involvement in the alleged act of abuse or neglect. A full and thorough investigation shall begin immediately following the report or discovery of the abusive action and the administrator and Director of Nursing Service shall participate in the investigation which should include interviews with any person having any knowledge of the alleged incident.

The nursing assistants at Valley View were repeatedly instructed by management to report abuse or anything they believed to be abuse to their unit supervisors. Such reports are to be made as soon as possible after the occurrence of the alleged abuse.

Croshier testified that on July 25, she went to work at 3 p.m., and was assigned to C wing along with two other assistants, including assistant Kris Robinson. At about 9:30 p.m., Kris Robinson came to Croshier and asked for her help in putting a patient to bed.¹⁴ This was consistent with the nursing home policy that two people are supposed to lift patients. The patient was described by Croshier as being in his 80s and suffering from Alzheimer's disease. Because of his condition, he is unable to rationally communicate and could not verify what happened to him. He was unstable on his feet and according to Croshier, can get violent. The two assistants wheeled the patient into his room where Robinson grabbed him under one arm and Croshier grabbed him under the other arm to lift him onto the bed. Croshier testified that her face was right on his back and Robinson's face was to the front. As they lifted him, Robinson let go and Croshier was holding him by herself. Robinson yelled, "He bit me." Croshier noted that the patient does not have teeth. Croshier testified that Robinson then punched the patient in the middle of his back quickly, about three times, with a closed fist. Croshier testified that she was shocked, did not comment, and put the patient into bed and walked out of the room.

Croshier testified that at this point she was angry and confused. She stated that she did not say anything to Robinson because she was afraid she may slap Robinson for hitting the patient. Almost immediately the unit supervisor on duty, Marge Mannion, asked Croshier to change a patient. She did so and was in the same room with Mannion, who was seeing to the needs of another patient. Croshier pointed out that the patient she was changing had not been changed since supper,

and Mannion said she would speak to the assistant assigned this task. Mannion inquired of this assistant when the other patients in the room accused the assistant of not changing them either. Mannion took no action with respect to these accusations. Croshier testified that she did not report that Robinson hit a patient to Mannion at this time because she did not think Mannion would do anything about it based on her lack of action against the other assistant.

She told no one else about the hitting incident that night and left work at 11 p.m. She testified that she was very confused and upset. She did not hate Robinson and did not want to get another employee in trouble. She had a troubled night and when she reported for work the next day, she told fellow nursing assistants, Alice Downey and Zerna Van Bramer, about the incident the night before, looking for advice about what to do. Van Bramer advised her to report the incident. Van Bramer testified and corroborated this testimony, adding that she told Croshier that failure to report abuse was also patient abuse. Croshier told her that she had been afraid that Robinson would be fired and also feared that Unit Supervisor Mannion would overlook the incident. Van Bramer told her that Robinson should be fired and should not be working around the patients. She again urged Croshier to report the incident. Croshier went to her wing and waited for the wing's unit supervisor for that day, Susan Patnode, to come out of a nurses meeting. When she did, Croshier said she had something to tell her and they went to a private room, where Croshier reported the incident of alleged abuse. Patnode said for Croshier to report it to Maryanne Dus.

She then found Dus in the employee lounge and the two went into the hallway, where Croshier told her what had happened. Dus asked why she had not reported the incident when it happened. Croshier replied that she forgot, explaining she did not want to go into detail in the hallway where others were present. Dus said she would handle the matter. Croshier returned to work and was told by Patnode to fill out an incident report. Croshier obtained the help of Van Bramer and filled out the report. It states:

Kris Robinson asked me to help her put [patient] into bed. We were putting him to bed and he bit Kris in the arm. Kris let him go, I ended up holding him alone and all of a sudden I saw her, with a closed fist, punching him in the back about 3 times. Then I said, Kris, what are you doing, he doesn't have any teeth so it couldn't of hurt. I should have reported it to my unit supervisor when the incident happened, but I didn't think about it until I got home. I felt negligent for not saying anything.

The report also has a crude drawing of a person with a mark in the area of the lower back indicating where the punches landed on the patient.

The report was given to Dus and Croshier resumed her normal duties. According to Unit Supervisor Patnode, Dus called the wing to say she was coming up to examine the patient. The patient was in a wheelchair, so Patnode and Nursing Assistant Van Bramer put him to bed. They undressed him and both noted three bruises on his upper back. Van Bramer verified that they found the bruises and said both were shocked. She did nothing further about this discovery, believing that Patnode had or would file a report.

¹³ Although most witnesses testifying herein agreed that incidents of actual or perceived abuse should be reported immediately, a number of them indicated their understanding that abuse must be reported within a 24-hour period.

¹⁴ The patient's name will not appear in this decision. Because of the description of the patient's condition and actions, it is felt that identifying him might cause unnecessary pain to his family.

After they had put the patient to bed, they left the room. Patnode testified that she encountered Dus on her way to the patient's room and told her that she had seen bruises. Dus did not comment and went into the patient's room. Dus came out, looked at Patnode, and said, "Yeah, there were bruises." Patnode asked if Dus wanted her to document anything, and Dus said she would take care of it. Dus instructed Patnode to write up what Croshier had told her.¹⁵

Dus disputed this account of events. She testified that she did check the patient and found two small healed open areas at the top of his buttocks from old pressure sores. According to Dus, he had a red mark about his midback which she attributed to sitting in his wheel chair. She found no bruising, swelling, or skin tears in the area Croshier indicated Robinson hit the patient. Robinson regularly wore a number of rings on her hands and Respondent's witnesses contended that blows from her closed fist would certainly tear the patient's skin. Of course, if blows were struck with an open palm, the rings would not make contact. Dus denied that Patnode said anything to her about checking the patient and finding bruises. She did ask Patnode to write a statement about the event.¹⁶

This is a very important point in this case. If there was clear bruising on the patient's back, then what Respondent did thereafter was clearly a coverup, either with respect to its actions against Croshier or to avoid the adverse publicity that patient abuse can bring to a nursing home. Although as I have indicated earlier, I do not believe that Dus was a candid witness in many respects, I really hesitate to doubt her with respect to a medical finding. On the other hand, there is no reason to doubt the professional integrity of either Unit Supervisor Patnode, a LPN, or Nursing Assistant Van Bramer. I will never know with absolute certainty whether bruising existed or not. All of Respondent's witnesses on this subject were adamant in stating that virtually touching this patient would result in some mark being left. However, as will be noted below, the alleged abuser, Robinson, admitted holding the patient's arms and pushing his face away from her. No evidence of bruising or other indicia of this physical

¹⁵Patnode gave a similar account of the incident, including her finding of bruising, in a newspaper article printed on August 1, 1991. There was no comment by Respondent's management in this article or a subsequent one introduced in evidence. Patnode's report, made in response to Dus' request, simply states that Croshier reported the alleged abuse to her. It does not mention the inspection of the patient by Patnode and Van Bramer.

¹⁶Alison Apple testified that she took it on herself to check out the patient on July 29. According to her, she found that he had a pink area on his left shoulder which was a breakdown area from pressure. She saw no redness or bruising on his back. She found no bruises on his hands, arms or face as well, though she testified that she had heard allegations by some nursing assistants that there were bruises. She wrote a report of these findings and placed it on her desk. She remembers telling Dus at some point that she checked the patient and found nothing. However, she did not mention her written report until she was in attendance at the first week of the hearing in this proceeding. As is indicated on the record in this proceeding, I have difficulty believing this testimony. The written report appeared to me to have been written very recently and not some months before. Additionally, there was no valid reason given why such a report was not given to Dus at the time it was made, a time when it would have had some real meaning. I do not credit the report. In her testimony, Dus did not relate receiving any verbal report from Apple with respect to the involved patient's condition.

touching was noted by anyone. Thus, it appears to me that the alleged abuse could have taken place without noticeable bruising. However, I do believe that the investigatory actions taken by Dus after her check of the patient were so patently cursory as to seriously question whether she cared whether there was patient abuse or not, and equally seriously call into question the thoroughness with which she checked the patient. Because of my other problems with her credibility and her lack of a thorough investigation into the matter in all other regards, I do not credit Dus' findings with respect to bruising and will credit the testimony of Patnode and Van Bramer on this matter.

After all of this checking of the patient, Croshier learned that Robinson had been suspended, presumably pending investigation. However, the next day, July 27, Robinson's suspension was lifted and she returned to work. Croshier asked Patnode why the suspension was lifted, and Patnode inquired of Joan Cooper, who told her it was none of her business.

Dus came into the facility that evening to make sure everything was running smoothly with respect to Robinson's return to work. She testified that Croshier was upset and asked why Robinson was back. Dus merely replied that she was not at liberty to say. Now at this point, if Dus believed no abuse had taken place, why did she not say so? Why not accompany Croshier to the patient's room and have Croshier explain why there was no bruising where she claims the patient was hit? For that matter, why not have Robinson and Croshier confront each other about the incident? However, Dus did nothing that would have provided some definitive answer to the abuse question.

On Monday, July 29, Croshier reported to work at about 3 p.m. and found a note with her timecard which indicated she should see Dus before beginning work. She then met with Dus in her office. Dory Bard and Alison Apple were also present. According to Croshier, Dus stated that Croshier was suspended indefinitely pending an investigation. Croshier asked why? Dus responded that she was suspended for falsifying records and getting everybody against Kris Robinson. Croshier denied this and stated that she had witnessed patient abuse and could not understand why she was being suspended and not Robinson. Dus told her to clock out and leave. No further questions about the alleged abuse were asked of Croshier. Croshier was discharged 2 days later for falsifying records, which consisted of her written statement about the alleged abuse.

Respondent's reasons for this apparently unusual turn of events follows.

According to Dus, her first reason for doubting the abuse occurred was Croshier's delay in reporting the incident. Although I believe that Croshier should have reported the incident immediately under the rules, I do not find that the delay really supports Dus's assertions that the accusation of abuse was a device to have Robinson fired. Certainly the consequences of reporting abuse would likely be the discharge of Robinson. Such a consequence would likely cause confusion in Croshier's mind as Croshier asserted. On the other hand, if Croshier were seriously trying to get Robinson discharged, nothing would be gained by delay in reporting the abuse. Any physical evidence of abuse, if it existed, would be present 24 hours later, and if it did not exist, would still not exist. Thus, delay could only subject Croshier to possible sanctions for not reporting the incident when it happened.

Dus testified that after she had checked the patient. She then brought Kris Robinson into her office, and brought in Suzanne Keyser, a unit supervisor, as a witness. She told Robinson of Croshier's allegations and let her read Croshier's statement. Then she asked Robinson to write a statement. Robinson became upset and said she did not hit the patient. She wrote a statement denying the allegation of hitting. The statement reads: "[Patient] had gone to bite me and I grabbed his hands. I did not hit him in the back. No I did not hit him in the back." Dus apparently asked no questions about the details of the incident nor did she ask Robinson to elaborate on her statement, which simply amounted to a denial. Dus then suspended Robinson pending investigation in accordance with patient abuse policy.

According to Dus, after Robinson left, Keyser, who had been employed as a unit supervisor at Valley View only since May or June, told her that "they've been trying to get rid of Kris Robinson for quite awhile. I've heard Sue Patnode and Kelly Croshier state, on several occasions, that no matter what it took they were going to see that Kris Robinson lost her job." Dus asked Keyser to write this information in the form of a statement.

The statement given to Dus by Keyser offers virtually the only basis on which Respondent could base its actions with respect to Robinson and Croshier, bruising of the patient aside. Thus the testimony of Unit Supervisor Keyser is very important.

Keyser's report that was submitted to Dus that night reads as follows:

Within this past week on several occasions, Susan Patnode and Kelly Croshier stated that they really wanted Kris fired and would see that it happened and happened real soon. Susan said she couldn't stand Kris and felt she was very incompetent. On 2 occasions this week Kelly came to me A/B desk using profane language that she felt it was unfair to work with someone who liked hurting patients, etc. I spoke with Pam Parsons who had worked with Kris frequently since I've been here. She told me in confidence, that she didn't believe Kris ever hit a patient. She had never seen her being physically abusive and said she certainly would have reported it if she had.¹⁷ As I stated earlier, I feel Kris was set up and I don't believe she struck at a patient. I find her to be a respectful hard worker that I trust and rely on. Received 7/27/91 M. Dus.

The circumstances under which this statement was given are interesting. Although Dus testified that the statement was voluntarily given, Keyser admitted after being confronted with her affidavit that Dus invited her to come to the defense

of Robinson.¹⁸ Keyser's affidavit states with respect to her written statement:

I had no hesitation in writing this report to Dus. Dus explained to me that charges had to be filed through Boston (The State of Massachusetts) on patients and chances are that she [Robinson] would not be able to work again in the nursing field. Dus said unless someone came to Robinson's defense, the home would have no alternative but to fire her (Kris). That bothered me because I knew she did not do anything, that it was a personality issue. Maryanne offered me the opportunity to think about writing up my feelings and observations. [Emphasis added.]

At this point, according to Dus, she had checked the patient and found no evidence of abuse. She doubts the story of Croshier because of the delay in reporting it. Thus, if one believes her testimony, she has an accusation of abuse with nothing to back it up, but is telling Keyser that she will have to fire Robinson unless someone comes up with a defense to support Robinson's denial. Keyser did not testify that Dus told her that she found no bruising. I believe Dus' invitation to Keyser to supply a defense, coupled with no mention of her alleged finding of no bruising, supports the testimony of Patnode and Van Bramer that there was visible bruising of the patient.

At the hearing, Keyser, who obviously disliked Croshier, testified that she told Dus that she felt Croshier set Robinson up to get her fired. She thought this because: "They had said way back—after my second week there, that she was a bitch, she was a patient abuser, that she didn't belong working with patients and they were going to make sure that she didn't stay there very long." She attributes these statements to Unit Supervisor Patnode, and Nursing Assistants Croshier, Kerry Doughty, Laurie Tomashek, Alice Downey, and Susan Huls. She testified that she heard these statements on a daily basis beginning shortly after she came to Valley View. Her testimony certainly expands both the timeframe in which alleged threats to get Robinson fired occurred and expands the list of alleged conspirators significantly. She added in response to where she heard these statements: "Either I was on the floor working and they were upset and had come to Sue Ann [Zank] or myself saying that they couldn't stand working with her anymore, and that they were going to leave the facility if they had to work with her; or I was in the dining room with the rest of the nurses eating lunch and they would often come to the dining room and sit down and chat with myself or Sue Ann [Zank]." Kelly and Sue Ann were extremely close friends. She testified that these comments were made in the presence of Zank, Tower, Patnode, and Carol Scarbrough. She brought none of these statements to the attention of Dus prior to July 26.

She testified that Tomashek, Huls, and Croshier complained to her while working that Robinson was a patient abuser, did not belong working there, and they did not like working with her and did not like her. They had cited inci-

¹⁷ Parsons testified that on the evening Robinson was suspended, Keyser approached her and asked if she had ever seen Robinson hit a patient. Parsons replied that she never had, though she had seen her abrupt, impatient and sometimes rude. Parsons then inquired why she was being asked this question. Keyser replied that she knew Croshier did not like Robinson. Parsons said, "Do you think it was—you know, do you think she just said it." According to Parsons, Keyser said she could not answer that, thanked her and left. Parsons denies ever telling Keyser that she did not believe Robinson would ever hit a patient. Dus never asked Parsons about the statements Keyser attributed to her.

¹⁸ The affidavit was used in cross-examination and I believed it was introduced in evidence. While writing this decision, I discovered it had not been, and informed the parties that it was being made part of the record as Jt. Exh. 1. No objections to this procedure were made by the parties.

dents of what they considered patient abuse by Robinson to Keyser. As a result, Keyser watched Robinson closely and found no evidence that Robinson abused patients. She did not volunteer her knowledge of the patient abuse allegations made by the other nursing assistants to Dus.

A number of the nursing assistants, including Croshier, Parsons, Huls, Van Bramer, and Downey, testified in this proceeding that they did have problems with Robinson's work performance and gave specific reasons therefore, citing specific instances of problems. All of them, and Unit Supervisor Patnode, denied there was any plot, conspiracy, or attempt to get Robinson fired, however. I believe their testimony.

Dus testified that at some unspecified time during the investigation, she checked Robinson's file and found no prior accusations of abuse or anything about patient abuse or neglect. According to Keyser's affidavit, this check would have taken place at or during the night of July 26. At some unspecified time, Dus also checked the nurses' notes with respect to the involved patient and found nothing to support the abuse charge. The nurses' notes likewise do not contain her findings with respect to the involved patient.

At this point, I again question what Dus found when she checked out the patient. Had she found no physical evidence of abuse, then why did she find it necessary to invite Keyser, who obviously disliked Croshier, to supply a motive for Croshier to lie about the incident, as evidenced in Keyser's affidavit. According to the affidavit and Keyser's testimony after having been confronted with the statement, Dus would have fired Robinson if no defense to the charges of abuse could be found. This statement of Dus strongly supports the testimony of Van Bramer and Patnode that physical evidence of the abuse existed.¹⁹ It would appear to me that normal priorities for a nursing home in such a situation would be to seriously try to determine what had happened. However, Dus' priority seems to have been to find a way to avoid a finding of abuse, even if it had occurred. She did not interrogate Robinson about the details of the alleged abuse to compare her story with that given by Croshier. Had she done so, she may have been surprised. A review of Robinson's testimony and her employment record with Valley View reveals a far different employee than the one Keyser described and felt compelled to give support.

Kris Robinson had been employed by Valley View as a certified nursing assistant for approximately 1-1/2 years at the time of the hearing herein. She testified that she attended two union meetings, one held at the Five Chairs restaurant, and the picnic at Kelly Croshier's house. She signed the pay petition, but not the petition indicating a preference among the nursing assistants for the S.E.I.U. Later she testified she

signed this petition and gave her address to Croshier for use with the union effort. Her affidavit to the Board taken during the investigation of this case indicates that she did not sign anything for the Union.

Her version of the abuse incident is similar to Croshier's, except she denies letting go of the patient and hitting him. She gave some confusing testimony about how she was holding the patient during the time of the incident, but ultimately testified that she grabbed one or the other of the patient's hands and pushed his face away when he attempted to bite her. She testified that she told Croshier that the patient had tried to bite her, and Croshier remarking that he did not have any teeth.

In response to the question, "Was there any truth to the statement Croshier made about the alleged abuse?" Robinson answered, "I don't believe so."

After her suspension on July 26, she went to her home. Later that evening, she again heard from Dus, who related she had checked the patient, found no bruises, and that she could return to work the next day. Again, if one believes Dus, she knew this at the time when she asked Robinson to give a statement earlier that day.

Robinson's personnel file which Dus reviewed reveals the following. It contains an employee warning notice dated 12-27-90 stating that Robinson was asked by another nursing assistant to ambulate a patient. Robinson told the other assistant, "Well, if she goes down, I'm not holding on to her because of my side." The warning also notes that Robinson was frequently unable to complete assignments or assist others due to her side. This was signed by Unit Supervisor Sue Ann Zank. Statements in Respondent's files about this incident include one from the other involved nurses assistant, Laurie Tomashek, which reads: "Lori asked Kris to help walk R. B. to the bathroom, patient had to go. Kris said, 'yes', with a very snotty attitude, and said, 'well, if she falls, she is hitting the floor because I'm not holding on to her because of my side.'" This version is corroborated by CNA Mark Bushika and Unit Supervisor Sue Ann Zank.

Another written warning prepared by Unit Supervisor Zank details two incidents in which Robinson acted unprofessionally in Zank's view. Zank recommended further discipline, including discharge if another such incident occurred.

Another incident occurred on 6-26-91 and resulted in a counseling by Michele Tower. This was caused by Robinson's rudeness to a patient's family.

An incident report dated 6-12-91 details an incident in which Robinson evidently let a patient fall, injuring the patient. Unit Supervisor Patnode wrote up this incident report, but did not recommend any action be taken against Robinson. This incident was brought to Dus' attention by Patnode. Dus commented at the time that she should have written Robinson up about the incident. It seems strange to me that if Patnode was looking for a reason to have Robinson discharged, she did not even attempt to have Robinson disciplined over this incident.

The file also revealed to Dus Robinson's only annual evaluation given in late December 1990 or early January 1991. This evaluation rates her at 2.8 (below average) and recommends continued employment only with reservations. With respect to her patient care, the evaluation rates her as below standard, and comments that she does not always give competent or complete care. It suggests that she is not a

¹⁹ Indeed, Dus' formal report to the State of Massachusetts about the incident concludes with a summary paragraph called "FINDINGS." This paragraph reads:

I found it difficult to believe that Kelly Croshier, C.N.A., who has been employed at Valley View Nursing Home since March 5, 1990, and who has attended inservices provided by the facility on Resident Abuse failed to report this incident immediately to her Unit Supervisor on July 25, 1991. In view of the signed witness statement by Suzanne Keyser, L.P.N., Unit Supervisor, I feel the allegations of Kelly Croshier were unfounded. I reinstated C.N.A. Kristina Robinson on July 27, 1991. She did not rely on the alleged lack of bruising in her conclusions.

team player and rates her below standard on human relationships. It also suggests that Robinson control her emotions. Robinson's written response to the evaluation states: "I think I do my job in a good way. How can you work with employees if they are not willing to work with you. How can you work with members if they are backstabbers."

She did not agree with any of the negative ratings or remarks on the evaluation, given by Unit Supervisor Sue Ann Zank. She believed that Zank was sort of stabbing her in the back. Though her signature appears on a written record of a verbal warning given her in October 1990, she denied having ever seen it at first, then admitted she had read it previously. She denied that the substance of the warning, given by Zank, was true.

Robinson categorically denied every other allegation from anyone testifying that she had ever done anything wrong, including dropping a patient while working with Pam Parsons, dropping a patient who began to urinate, and washing a patient with an incorrect cleaning agent. She testified that everyone who said anything about her lied. She disagreed with any negative connotation that could be derived from any incident testified about or documented in the record. She considered every negative thing said or written about her in the record to be wrong or untrue, though she had no reason why all of the people involved would say incorrect or untrue things about her.

Had Dus chosen to question Robinson to any extent, Robinson's inability to admit any failing would have been readily apparent. Yet, as far as this record is concerned, she was never asked about the incident in any detail until she testified in this proceeding. Any reasonable person hearing Robinson's testimony would have serious doubts about Robinson's denial of the charge of abuse and, I believe, would have investigated the incident as fully as possible. Yet, Dus, with no serious questioning of Robinson, whose personnel file was replete with incidents of problems, and apparently accepting the wholly unverified and solicited allegations by Keyser of a plot to have Robinson fired, decided there was no abuse. She then called Administrator Brewer and they discussed the matter. They decided in view of what Dus knew, that they were going to reinstate Robinson and that this was a falsified case of abuse. Dus then called Robinson and told her to come to work the next day.

Dus testified that the next day, July 27, she again checked the patient and again found nothing to indicate that he had been hit in the back. I do not credit this testimony for the same reasons that I did not credit her earlier alleged finding of no bruising. She reported the incident to the State of Massachusetts as required by law.

Nothing else was done until July 29. Dus made a further report to the State, and talked about the incident with Respondent's Regional Manager Erl Benson and HCR Human Resource Manager Patricia Gillette, who was still at the facility. They then made the decision to suspend Kelly Croshier. As noted earlier, Croshier was summoned to Dus' office, told she was being suspended for falsifying records about the abuse incident which Croshier denied, and Croshier left.

Following this meeting, a number of the nurses assistants working at the time learned of Robinson's return and Croshier's suspension. After a confrontation with management, they walked out of the facility in protest and were dis-

charged. This matter will be discussed in the next section of this decision. Later, on July 29, according to Dus, she had the names of several other nurses that Keyser had indicated could corroborate the plot to get rid of Robinson. Dus sought out Unit Supervisor Sue Ann Zank, who gave her a statement about the Patnode-Croshier plot to have Robinson discharged. This statement tracks the Keyser statement almost verbatim. She also volunteered another statement, noted earlier, accusing Patnode of encouraging the nurses assistants to walk out to achieve their ends, during a July nurses assistants meeting.²⁰ Dus testified that she contacted Unit Supervisor Karen Zink, but she could not corroborate the plot. This ended her investigation of the abuse incident.

On July 30, Dus and Brewer decided to terminate Croshier. The okay from Benson and Gillette was sought and obtained. It was on this date that Brewer sent her letter to the families of the residents informing them about Croshier's suspension, the alleged patient abuse and the walkout by the nursing assistants. Interestingly, this letter, coauthored by Gillette, goes on to state: "You should also be aware that the Service Employees International Union, Local 285, is trying to organize our employees. We are expecting them to be passing out literature at the driveway periodically during the next several weeks. Please be assured I and the staff at Valley View will be doing everything possible to minimize the disruption to our residents." Therefore, it is clear to me that as of the date that Respondent decided to discharge Croshier, it still considered the union organizing campaign to be underway.

On Wednesday, July 31, which was payday at the nursing home, Croshier went to pick up her check together with some of the nursing assistants who had walked out in protest. As the group was entering the facility, they were stopped by Dus, Brewer, and Bard. Bard handed everyone their checks, except Croshier, who was asked to accompany Dus and Brewer to Brewer's office. As they entered the office, Dus said that Respondent was terminating Croshier for falsifying records. Croshier denied this and asked to see the records, but Dus declined, saying they were personnel records and belonged to the nursing home. Croshier took her check and advised Brewer and Dus that they would be hearing from her lawyer.

In deciding cases dealing with discriminatory suspensions and discharges, the Board has established a causation test to be utilized. In *Wright Line*, 251 NLRB 1083 (1980), the Board held that the General Counsel must first make a prima facie showing that protected conduct was a motivating factor

²⁰ Zank was a less than candid witness. She demonstrated hostility towards the General Counsel and was unwilling to agree with anything inconsistent with Respondent's position, even when her testimony conflicted with her earlier documented actions. She tried to find excuses for anything she may have written negatively about Robinson. She testified that she did not take the alleged Patnode and Croshier threats about Robinson seriously when she heard them, but changed her mind when the Robinson-Croshier incident occurred. However, she had no reason for her failure to volunteer her information, instead waiting until Dus sought her out. She gave no reason for waiting until July 29 to report events of the nurses meeting, and pointedly, for naming only Patnode as making suggestions that the nurses assistants should organize and walk out. The evidence of other witnesses establishes that Unit Supervisors Tower and Zink made similar statements. I do not credit Zank's testimony or statement about the alleged Croshier-Patnode threats about Robinson.

in the employer's decision; the burden then shifts to the employer to demonstrate the same action would have taken place even in the absence of protected conduct. I believe that the General Counsel has clearly met his burden of proof.

Respondent was shown to have harbored antiunion animus. It responded to the first hint of a union organizing campaign by beginning one of its own against the Union. It showed films to employees, wrote an antiunion letter to employees over the signature of Brewer, and distributed newspaper articles designed to discourage support for the Union. I believe it brought Dus and Brewer into the nursing home in furtherance of its attempts to defeat the union campaign. In response to Croshier's and the other nursing assistants' pay raise petition, Respondent gave its employees a 25-cent-per-hour across-the-board pay raise. Though Brewer testified that the raise was given as a result of an area pay survey, it is clear that the impetus for giving a pay raise was the petitions. HCR Regional Manager Benson even telephoned Croshier after the raise was given to see if she was pleased. It must have been a surprise to find that she was not. At virtually all times material to the events covered by the complaint herein, HCR had its Human Resources Manager Patricia Gillette on premises, obviously guiding the campaign and ultimately giving her approval to the personnel action taken against Croshier.

Respondent knew of Croshier's involvement in the campaign. As noted above, almost every witness, whether presented by the General Counsel or the Respondent, identified her as in the forefront of the union organizing campaign. She was also vocal in her complaints about pay and supply problems, provoking Unit Supervisor Patnode to warn her in July that she could be fired for being so vocal in her complaints. The only witnesses that tried to downplay their knowledge of the campaign and Croshier's part in it, were Brewer and Dus. This attempt to deny knowledge damages their credibility badly in my opinion. All of their subordinates knew of the campaign and Croshier's role in it. Brewer was clearly aware of the campaign as she wrote an antiunion letter to employees in July and conducted at least one meeting concerning the campaign, with Dus in attendance, wherein she expressed the Respondent's desire not to have a union. Brewer wrote another letter expressing a clear belief that the campaign was alive and well simultaneously with the discharge of Croshier. Dus' main witness against Croshier, Unit Supervisor Keyser, knew of Croshier's role as a strong union supporter, and she had only worked at the facility about a month longer than Dus and Brewer.

The abuse allegation gave Respondent an opportunity to rid itself of the union's leading proponent. Instead of conducting a thorough investigation to determine if abuse occurred, Respondent, through Dus, invited the shifting of attention from the alleged patient abuser to Croshier and thereafter moved with remarkable speed to get rid of Croshier, while ignoring any real possibility that patient abuse had occurred. For the reasons noted above, I do believe that physical evidence of abuse existed and was known to Dus. In her discussion with Keyser after suspending Robinson, she invited Keyser to give her a defense of Robinson, noting that she would have to fire Robinson if a defense could not be found. Keyser, who obviously disliked Croshier personally, complied and implicated Croshier and Unit Supervisor Patnode in a conspiracy to have Robinson discharged. Prior

to Keyser's allegation on July 26, no one had ever hinted to Dus that Croshier or Patnode were out to get Robinson. As noted above, only shortly before the abuse incident, Dus had admonished Patnode for not giving Robinson a written warning for her actions in which a patient had fallen while in Robinson's care. Yet, this incident, which supplies clear contradiction to an alleged desire by Patnode to have Robinson fired, was ignored by Dus.

Having gotten her defense of Robinson from Keyser, Dus reinstated Robinson without any further investigation. The patient's physician was not called in to examine the patient and the patient's family was not notified. Neither Croshier nor Robinson, nor any other nursing assistant or unit supervisor was thereafter asked about either the abuse or the alleged conspiracy prior to Croshier's suspension. Respondent apparently put on blinders at this point and proceeded to get Croshier out of the nursing home. According to Respondent, Croshier was suspended, pending investigation, for violating Respondent's Rule 4, "TYPE A (MAJOR)," which reads:

Falsification of or misrepresentation on facility records, reports or other documents, or misuse, disclosure or removal of any record, report or document.

Violation of this Rule will result in discharge for the first occurrence.

Respondent did not consider Rule 1, "TYPE B (SERIOUS)," which reads:

Making false or malicious statements about a resident, employee or supervisor or the company.

Violation of this Rule may result in discharge, but if discharge is not appropriate for the first occurrence, the violator will receive a final written warning.

As I stated on the record, I do not believe that the rule under which Croshier was disciplined is applicable. The "report" which she is accused of falsifying is the report of the incident of abuse, which she was required to write at Dus's insistence. I believe that the rule is intended to cover falsification of medical and other reports and documents kept by the Company in the ordinary course of its business. If one believes Croshier lied about Robinson, and I do not, then she probably did violate the lesser rule noted above. I find it consistent with Respondent's overall handling of this incident that it chose to discipline Croshier under an inappropriate disciplinary rule, one that required discharge. No other application of the rule under which Croshier was discharged was documented in the record.

The fact that virtually all the nursing assistants who were working in the facility when Croshier was suspended walked out in protest over the suspension did not lessen Respondent's intent to get rid of Croshier. These assistants made it clear to Dus and Brewer that they believed Croshier and not Robinson. It should be noted that even Keyser admitted having heard that Robinson was a patient abuser from a number of other employees. However, instead of prompting a more thorough investigation, the nursing assistants' action simply got them fired as well as Croshier. Dus followed up on the matter after the walkout by getting what I consider an unbelievable corroborating statement from another unit supervisor and calling the investigation over.

All the circumstances surrounding Croshier's suspension and discharge lead me to find that the reasons given for them were pretextual. Based on the "investigation" described in this record, Respondent could not begin to be sure that abuse had not occurred as stated by Croshier. Yet, it disciplines the accuser, not the alleged abuser, in total contravention of its apparent policy promoting the reporting of any real or perceived abuse of a patient by an employee. Its actions in the Croshier case not only will have a chilling effect on the next nursing assistant who decides to openly support a union, but on any nursing assistant who observes what he or she believes is patient abuse. Given Croshier's position as a union supporter, Respondent's union animus, and its handling of the abuse incident as discussed above, I find that Croshier's union and protected concerted activities provided the motivation for her suspension and discharge.

Would Respondent have discharged Croshier in the absence of protected conduct? I believe this question can only be answered in the negative. Respondent does not have a history of firing any employee prior to the Croshier incident for making false reports about fellow employees. One wonders if Dus is investigating the truthfulness of the various reports contained in Robinson's personnel file accusing her of less than professional conduct with an eye to firing their authors. Robinson contended these were all lies, just as she did Croshier's allegations about her abuse of the involved patient. Croshier was shown to be a conscientious nursing assistant, well thought of from a professional standpoint by her peers. Robinson was shown to be a problem employee, and considered to be less than qualified professionally by her peers. Any investigation involving the questioning of Robinson would have raised doubts about the veracity of her denial of the alleged abuse. Any widespread investigation of the allegations of a conspiracy by Croshier would have turned up employee after employee who would have denied the existence of such a conspiracy. Giving the Respondent the most charitable view of the situation, it may have decided after a thorough investigation that it could not prove beyond a doubt that abuse occurred or did not occur. Under this set of circumstances, it is inconceivable that it would have discharged Croshier, who was required by the Company's rules to report perceived abuse. Yet, as noted, a thorough investigation was not conducted, Robinson was not questioned, and a defense of Robinson was invited from a person who disliked Croshier. Something other than a desire to reach the truth about the abuse situation is reflected in this record, and I believe that is a desire to discharge Croshier for her protected activity.

F. The Walkout in Support of Croshier and Subsequent Discharge of the Involved Nursing Assistants

After her suspension, Croshier left Dus' office to clock out and met fellow employees Alice Downey and Sue Huls, and in response to Downey's inquiry as to why she was crying, she replied that she had been "fucking suspended." As she proceeded down the hall, a patient asked what was wrong and she replied that she had been suspended for reporting patient abuse. She then called for a ride home and went outside the nursing home. There she told some kitchen and laundry employees what had happened to her. As she was leaving the premises, nursing assistant Sue Huls yelled from a window for her not to leave.

Huls then met with some of the other nursing assistants suggested that if Respondent did not bring Croshier back or give some reason why Croshier was suspended, they all walk out in protest. Shortly thereafter, Huls met Bard and threatened a work stoppage if Brewer would not meet with the nursing assistants about Croshier's suspension. Thereafter, there was an announcement over the intercom telling all nursing assistants to report to Dus' office. She and the other assistants started to the office, when a correction was announced over the intercom, stating that nurses were to come to the office. A little later, the assistants were again called to the office.

When they arrived, they were met by Dus, Brewer, Bard, and Apple. Of the nursing assistants in the facility, only Robinson was not present at the outset of this meeting. She came in later. According to Huls, who I found to be an entirely credible witness, Dus began the meeting by stating that it had come to her knowledge that the assistants were concerned about the circumstances with Kelly Croshier and that the assistants were thinking of a walkout. She continued by stating that Valley View had serious charges against Croshier, and the assistants were just going to have to trust her on this. Huls asked if suspension had anything to do with the Union and Dus said no. Huls and Nursing Assistant Van Bramer both testified that Dus did not look at the assistants when giving this answer, but looked at the floor instead.

Huls testified that she asked the question because she was sure that it had to do with the Union. Dus at this point repeated that she had serious charges against Croshier and that the assistants would have to trust her. Huls replied that they did not trust her. She explained that she did not trust Dus and Brewer because they had not followed through on the assistants' complaints about the gloves they had to wear when treating patients and the provision of supplies. Now they were suspending Croshier. She told Dus that she did not think it was fair that a good employee reports a case of patient abuse as they are required to do and is suspended, and the reported employee, who is disruptive and abusive, is recalled to work. She reiterated the point and said that the nursing home was not a place she would want to work if Croshier cannot have her job. Huls and the other assistants then began to leave. Dus admitted that none of them said they were quitting their employment.

They walked down the facility's hall to punch out. Two unit supervisors asked them to think out what they were doing, and Huls replied that Respondent was not thinking about them, about the residents, or about Croshier. After punching out, the group of nursing assistants went to their cars in the parking lot. Dus and Brewer followed them and warned them that by leaving, they were voluntarily terminating their jobs. Huls responded she realized this if Respondent were not going to bring back Croshier. The group of assistants that left under these circumstances included Huls, Alice Downey, and Zerna Van Bramer. Some other nursing assistants also left at this time, but were not named in the complaint. The nursing assistants who participated in the walk-out testified that they did not intend to quit their employment by their action, but rather were protesting Croshier's suspension.

The assistants went to a nearby service station and began crying because they had been told they were fired, and they did not know what to do about paying their bills. Susan

Patnode eventually came to the station and invited the assistants to her house. Before they left, however, Nursing Assistant Pam Parsons, who was scheduled to work from 5 to 9 p.m., saw the group as she was driving to work. She pulled over and noted they were all crying and screaming. They told her that they had just walked out of the nursing home because Croshier had been suspended and Robinson returned to work. They also told her to do what she wanted about the situation. Parsons told them to wait, she would be back. She then went to the facility and clocked in. Shortly thereafter, she was told by Dory Bard that Croshier had been suspended pending investigation and that Kris Robinson was back. Parsons asked why Croshier had been suspended, and Bard replied that Respondent had some serious charges against Croshier. She declined to specify what the charges were, but said to trust management and that if Croshier was cleared, she would be back in 3 days. Bard also commented that a bunch of Croshier's friends had walked out because of Croshier's suspension. After a few minutes, Parsons decided to leave, told Bard that she was leaving, that she could not deal with the situation and left. She described the condition at the nursing home at this time as chaotic. She was not aware that by leaving she was severing her employment relationship. She learned a couple of days later that her timecard had "terminated" written across its face.²¹

The next day most of the involved assistants went to the Massachusetts State Unemployment Office, where they were told to write out a resignation and give it to the Company. No explanation of why this advice was given appears in the record, and no one offered any evidence to show that such advice was not given. Therefore, I do not consider the fact that the involved nursing assistants thereafter prepared and presented resignations to be of consequence. It is clear from the record that Respondent considered the employment of the nursing assistants to be terminated when they left the facility on July 29.

All the employees who walked out had the words "punched out left—terminate," or similar words written on their timecards. Dus prepared an employee separation report in which she checked off a box that read that Huls (as well as the other employees) were voluntary quits, and she wrote "walked off job 7/29/91" and "would not rehire." Brewer prepared a statement in which she wrote that Huls was considered "a voluntary quit after abandoning the residents under her care on 7/28/91. As per Rules for Your Protection #7A." Rule 7A states that "Abandoning your job by walking off the shift without permission of your supervisor or administrator" is a major violation which result in discharge. Brewer testified that Respondent terminated the nursing assistants who walked out on July 29. Furthermore, Dus admitted that the employees walked out in support of Croshier, and she could assume that if Croshier were returned to work, the employees who walked out would have returned. Brewer could envision no situation involving employees who walked out or struck "without permission" that would not be considered abandonment of the job.

On the Wednesday of that week, the involved nursing assistants picked up their checks and turned in their resignations. Respondent notes that none of the assistants asked for

reinstatement. This would have been unlikely in my view because the reason for their walkout, the suspension of Croshier, had not only not been reversed, but Croshier was discharged.

The General Counsel contends that the nursing assistants were engaged in concerted protected activity when they walked out and were discharged by Respondent for engaging in that activity. Respondent contends that they were not engaged in protected activity, and in fact, voluntarily quit their employment when they left the premises. I believe it is clear that the walkout was concerted and was made in protest over the suspension of Croshier. As I have found that the suspension of Croshier was motivated by her union activity and was thus a violation of Section 8(a)(1) of the Act, the walkout was over Respondent's unfair labor practices. Such activity has heretofore been considered by the Board as an unfair labor practice strike and afforded the protection of Section 7 of the Act. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *Masonic Home*, 206 NLRB 789 (1973), *Danville Nursing Home*, 254 NLRB 907 (1981), and *Syn-Tech Window Systems*, 294 NLRB 791 (1989).

Respondent argues that the involved employees did not strike over the suspension of Croshier, but by walking out knowingly and voluntarily quit their employment under Respondent's rules, which call any leaving of the premises during working hours without permission to be voluntarily terminating one's employment. Such a rule cannot be lawful as it would prohibit a strike under any circumstances. Moreover, the involved assistants did not quit their jobs. It is clear from the testimony of Dus and Brewer, as well as Respondent's documentation of the incident, that they walked off the job in protest and were terminated. The action of the assistants in walking off the job was voluntary, the decision to terminate them was that of management. Respondent could have addressed the concerns of the assistants by either meeting their demand for a reasonable explanation of Croshier's suspension, or by agreeing to rescind the suspension pending an investigation. It did neither.

Respondent went to great efforts to demonstrate in this record that the action of the nursing assistants created a chaotic condition in the nursing home on the day of the walkout and for sometime thereafter. However, it considered its policy of not divulging its reasons for personnel actions to the assistants to be more important than the certain problems that a walkout of the assistants would cause. Again, I believe the Respondent has its priorities out of order. The concern that Respondent would have me show for the consequences of the walkout is also greatly tempered by the fact that these same nursing assistants were encouraged by Respondent's supervisors to take just the action they took in order to achieve their goals. Respondent learned of this encouragement to engage in a walkout on the day of the walkout, but did not consider it a mitigating factor in its decision to terminate the assistants who had followed the supervisors' advice.²²

Neither the nursing home nor its residents were shown to have suffered any injury by virtue of the walkout. Indeed, in a letter from Brewer to the families of residents dated July 30, she points out that staffing levels were being maintained

²¹ Nursing Assistant Laurie Tomashek evidently also walked out sometime after the first group.

²² Respondent notes on brief that the notice requirements of Sec. 8(g) of the Act do not apply to unrepresented employees, thus a discussion of this point is unnecessary.

and resident care was being provided at the facility's quality standards. I cannot find that the nursing assistants took any action which would deprive them of the protection of the Act, and thus find that their discharge on July 29, 1991, by Respondent, for engaging in concerted protected activities violates Section 8(a)(1) of the Act.²³

G. The Alleged Discharges of Michele Tower and Susan Patnode

The General Counsel alleges that Unit Supervisors Michele Tower and Susan Patnode were discharged on or about July 31, 1991, because of their activities on behalf of the Union or other protected concerted activity. Respondent contends that they were not discharged, but voluntarily resigned, and in any event, were statutory supervisors and not entitled to the protection of the Act under the circumstances. I have heretofore found that the position held by these two women, unit supervisor, is that of a statutory supervisor. Therefore, even in the event they were discharged for activity that would be protected if they were ordinary employees, there is no violation of the Act. However, I will make findings with respect to the complaint allegations because certain comments made by Respondent's management with respect to these two women bear on other issues, and the Board may subsequently hold that they were not statutory supervisors.

Tower is a licensed practical nurse and was employed by Respondent as a unit supervisor from April or May 1990 to on or about July 31, 1991. She was initially hired in the position on a casual, on call, basis, working on the 3 to 11 p.m. shift. Under this arrangement her weekly hours ranged from a low of about 16 hours to a high of 60 hours. In November 1990, her status changed to full time, working at least 32 hours per week. Again, in February or March 1991, her status changed to one where she worked different shifts during the workweek. This change was prompted by difficulties Tower was encountering balancing her work with raising her children. By the summer, it became too difficult and she resigned. The then director of nursing, Tom Lusa, asked her to rescind her resignation and offered her casual, on-call work again. She accepted this arrangement in May. She usually worked on the 3 to 11 p.m. shift.

She testified that from the day she began work at the nursing home she felt it needed a union. She learned the nursing

assistants were talking about a union in January. Whenever she was asked about unions by assistants, she would encourage them to organize. As noted earlier, in response to a request by Croshier, Tower directed her to call Sheri Gimlewicz, the union steward at Edgecombe Nursing Home, where Tower had previously worked. Tower testified that she also supported the nursing assistants organizing effort in meetings the unit supervisors held with the assistants. She noted one such meeting in July, discussed earlier, where she attempted to get across to the assistants the point that they had strength in numbers, without openly encouraging them to organize. Tower remembered singing "United We Stand, Divided We Fall" during this meeting.

Tower testified that she was fired on July 31. She had worked the previous day. On July 31, she was in and out of her house during the day, returning in the afternoon to prepare to go to work at another job she had, when she discovered a message to call Dory Bard on her answering machine. As she was running late, she waited to return the call until she arrived at her other job, caring for an ill child. She returned Bard's call at about 3 to 3:15 p.m. Bard told her that she was in a meeting and she would call back. However, instead of Bard calling, Dus called shortly after 5 p.m., and said, Michele, we are not going to need you tonight. Tower knew she was scheduled to work that night and her schedule, once set, was rarely changed. Thus, she testified that she was shocked. Dus said she hoped this was not a problem, and Tower explained that is was as she had already obtained a sitter for her children. Tower asked if she was to report to work the following night as scheduled and Dus said no, the nursing home would no longer need her services. Tower asked why, and Dus said she could not discuss that at the time and hung up.

At about 7 p.m., she called Dory Bard and asked what was wrong, and had she done something wrong. Bard said no, you did not do anything wrong, you are an excellent nurse. Tower asked why had they fired her. Bard said she could not tell her why. Tower began crying and begged her to do so. Bard finally said that was because of personalities and that she would have to prove to Dus that she could "lay low and keep quiet" for a month. After further pressing, Bard elaborated that she had to prove that she will not speak to Susan Patnode, Karen Zink and Shift Supervisor Barbara Cardalico. If she could do that, Bard said she would help get Tower's job back.

Dus testified that she had learned of Tower's behavior in the July nursing assistants meeting from Unit Supervisor Zank, presumably on July 29. Because of this behavior, she did not want Tower to work again until she had spoken to her about the incident and perhaps had given her a warning. Dus denies that she fired Tower during her telephone conversation and testified that Tower resigned before she could speak with her again.²⁴ Bard admits her telephone conversa-

²³ C.N.A. Susan Carpenter, a current employee of Respondent, testified that on July 31, 1991, she had a conversation with Joan Cooper who told her that a number of nursing assistants had walked out over the Croshier—Robinson incident. She added that Brewer and Dus had tried to talk them out of it. The next day Carpenter received a phone call from Dory Bard, who said she wanted to give Respondent's side of the story. Bard said that Croshier was trying to set up Robinson to get fired by saying that she had hit somebody. Carpenter said that it did not make sense that they would leave over that. Bard then commented that, "well, if I have it my way, they'll never work in another nursing home again." Bard admitted having this conversation and all of the comments attributed to her except the threat. I credit Carpenter's version of the conversation. She had absolutely no reason to lie, and Bard was shown in the record to make comments beyond what one would expect from a supervisor. Accordingly, as it is clear from the context of the conversation that Bard was threatening to blacklist those nurses assistants who were engaging in concerted protected activity for engaging in such activity, I find that Respondent, acting through Bard, has violated Sec. 8(a)(1) of the Act thereby.

²⁴ On or about July 31, Tower submitted a resignation that reads: It is with sincere regret that I must inform you of my resignation, to become effective immediately. For personal reasons, I no longer feel I can continue my employment within a facility that condones and rewards patient abuse.

Tower testified that she filed the resignation because she believed she had been fired and was following the advice of the nursing as-

Continued

tion with Tower, but denied agreeing that Tower had been fired. She admitted that she told Tower that she had to lay low until she heard from them again, but explained that she meant that Tower would have to stop acting hysterical like she was acting in her telephone conversation. Bard testified that she had planned putting Tower back on the schedule after she had spoken with Dus, but Tower resigned the next day and she never thereafter spoke to her again. I credit Tower's version of her conversation with Bard and Dus. Bard's explanation of the conversation, and especially the explanation of the laying low comment did not make sense, whereas Tower's version does. Similarly, Dus did not call and request that Tower come in and speak with her, or wait until Tower came into work to speak to her as she could easily have done. There was no purpose in calling Tower and telling her not to report to work unless she was either fired or suspended. To gauge the seriousness with which Dus must have taken Tower's encouragement of the nursing assistants, one must realize that July 31 was the third day of the walk-out, and according to Respondent's witnesses, they were having a great deal of trouble getting sufficient staffing. If Respondent is truthful about its staffing difficulties at this time, Tower's services should have been in great demand.

I also believe it is clear that Tower believed she was fired and I similarly believe that was a logical assumption to make based on the calls from Dus and Bard. Bard indicated she would have to wait a month and prove that she could disassociate herself from certain other nurses, one of whom, Patnode, was also in trouble for encouraging the assistants to walk out. Therefore, her continued employment was contingent on her convincing Dus that she would cease engaging in what would be protected activity if she were not a statutory supervisor. She was never called or put on the nursing home work schedule thereafter. Her resignation, which was prompted by her belief that she had been fired, was accepted without comment by Respondent.

Because I have found Tower to be a statutory supervisor, I do not find that Respondent violated the Act by discharging her. On the other hand, if she is found not to be a statutory supervisor, then her discharge was clearly and admittedly the result of her protected activity, encouraging fellow employees to organize themselves.

Susan Patnode, an LPN, was employed as a unit supervisor by Respondent from November 29, 1990, until July 31, 1991. She was employed on an on-call or casual basis. In April, this changed to a 24-hour part-time position. In her request for this position, she indicated that she could work 40 hours per week. In the time that followed, she worked about 37 hours per week on average. In this position, she could not pick her days off as she could as an on-call employee.

With respect to union activity, she testified that in July, she met with Union Organizer Ben Hensler to discuss organizing the unit supervisors. She discussed what he told her with other unit supervisors, including Suzanne Keyser, Sue Ann Zank, and Carol Scarbrough. The group discussed, inter alia, who they thought would be interested in a union. A few days later while on break at the nursing home, she again discussed the matter of the Union with Zank and Michele Tower. In this discussion, she pointed out that nurses at

unionized nursing homes made more money. She knew the nursing assistants were engaged in union activity because they were very vocal about it, especially Croshier.

With respect to the nurses assistants meeting in July, she testified that she told Croshier, who was vocal in her complaints about staffing and supplies, that if she spoke on her own, she would be fired. However, if the nursing assistants spoke together they would be safe as there is strength in numbers. She also testified that similar comments were made by Tower. According to Patnode, Unit Supervisor Karen Zink told the assistants they had the power to walk out. Unit Supervisor Zank reported these statements to management on or before July 29, attributing the advice to walk out to Patnode.

On July 27, Patnode tendered a resignation stating that her last day of work would be August 9. On July 31, an employee separation report was filled out by Dus, which reflects that Patnode resigned, and noted that she would not be allowed to work out her notice, and indicated she would not rehire Patnode. At the time of her resignation, she was scheduled to work several days in the upcoming 2 weeks. Dus testified that she and Brewer decided not to let Patnode work out her notice because of her reported behavior in the nursing assistants' meeting.

When Patnode went to get her paycheck on Wednesday, July 31, she was told to meet with Dus and Brewer, who were at lunch at the time. Bard came up and the two went outside the home. Bard told Patnode that she was in a lot of trouble, because she had been seen with the nursing assistants at the service station by an assistant named Missy Burbank. Bard said that management believed that Patnode set the whole scenario up. Patnode denied it. Bard continued by saying that though Patnode was a fine nurse, she talked too much, was a troublemaker, and voicing her opinion had gotten her into trouble. Bard said that it was all union stuff and that there was no (patient) abuse. Patnode asked how they knew there was no abuse, because there was no investigation. That ended the conversation.

Bard testified that Patnode said how terrible it was about the girls who walked out. Bard said she just listened and did not say much. She testified that she did not tell Patnode that Brewer and Dus had decided not to let her work out her notice period, though she knew of this decision and reason for it. She denied saying Patnode was in trouble, and that Dus and Brewer believed she had instigated the walkout. She could not recall saying that management knew that she was at the service station with the nursing assistants, though she admitted that she knew this fact at the time of the conversation. I credit Patnode's version of this conversation. The knowledge Patnode gained from this conversation was accurate, was within Bard's knowledge and could not have been gained by Patnode from another source. Had Patnode not been a supervisor, I would find that Bard's calling her a troublemaker for voicing her opinion, clearly a reference to Patnode's comments in the nursing assistants meeting, would constitute an independent violation of Section 8(a)(1) of the Act.

Shortly thereafter, she met with Dus and Brewer. Dus said she had received Patnode's resignation letter and that her services were no longer needed, that she was to leave, and that she would be paid until August 9. She asked why they were doing this, and received no answer. Finally, Brewer

assistants who told her she had to resign to collect unemployment benefits.

said it was for the betterment of the Company. They would not let her go into the nursing home and escorted her to the door.

Patnode said that she did not intend to resign totally from her position with the nursing home, but wanted to go back to an on-call status. The only evidence of this is the language of her resignation. This reads: "I hereby resign my position of 24 hour Unit Supervisor at Valley View Nursing Home. My last day of work will be August 9th. If you wish to call me to help fill in, please feel free." I cannot find that this language clearly supports Patnode's contention that she was asking to be placed in a casual, on-call position after August 9. It could more easily be read to mean that they could call her for work between the date of the resignation and August 9. Moreover, there were no casual, on-call positions available at the time of her resignation. Such positions are posted at the facility when they are available.

It is clear from the testimony of Dus and Brewer as well as the employee separation report filed by Dus that Patnode would have been discharged had she not resigned. However, she did resign and her reasons for doing so had nothing to do with her activity with the nursing assistants or her union activity. If she were not a statutory supervisor, I would find that Respondent violated the Act by not letting Patnode work out her notice period, and by noting on her personnel file that she would not be rehired. Such actions were admittedly taken because of Patnode's encouragement of the nursing assistants to organize themselves.

CONCLUSIONS OF LAW

1. Respondent Health Care and Retirement Corp., Valley View Nursing Home is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local 285, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent's position of unit supervisor is that of a supervisor within the meaning of Section 2(11) of the Act and thus, Michele Tower and Susan Patnode are statutory supervisors.

4. Respondent has engaged in the following unfair labor practices in violation of Section 8(a)(1) of the Act:

(a) Acting through Alison Apple, interrogating Nursing Assistant Susan Huls about her union activity, and that of other employees.

(b) Acting through Doris Bard, threatening employees who engaged in protected concerted activity with blacklisting because of such activity.

(c) On July 29, 1991, discharging Nursing Assistants Susan Huls, Alice Downey, Zerna Van Bramer, and Palmela Parsons for engaging in protected concerted activity, which consisted of walking out on strike in protest of Respondent's unfair labor practice suspension of fellow employee Kelly Croshier.

5. Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act by on July 29, 1991, suspending, and on July 31, 1991, discharging its employee Kelly Croshier because she engaged in protected concerted and union activities.

6. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. For the reasons set forth in the body of this decision, Respondent is not found to have committed the other unfair labor practices alleged in the complaint.

REMEDY

Having found that Respondent has engaged in and is engaging in conduct in violation of Section 8(a)(1) and (3) of the Act, it is recommended that Respondent be ordered to cease and desist therefrom and take the following affirmative action necessary to effectuate the policies of the Act.

Having found that Respondent, on July 29, 1991, unlawfully discharged its employees Susan Huls, Alice Downey, Zerna Van Bramer, and Palmela Parsons, and on that date, unlawfully suspended and subsequently discharged its employee, Kelly Croshier, it is recommended that Respondent be ordered to offer these employees immediate reinstatement to their former positions, discharging if necessary any employees hired to replace them, without loss of any seniority or benefits to which they would be entitled were it not for Respondent's unlawful action against them. I further recommend that Respondent be ordered to make them whole for any losses they may have suffered by virtue of Respondent's actions, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest thereon computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I further recommend that any reference to the unlawful discharges be removed from the records of Respondent and that it provide the discriminatees with written notice of such removal and inform them that their unlawful discharges will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁵

ORDER

The Respondent, Health Care and Retirement Corp., Valley View Nursing Home, Lenox, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union activities.

(b) Threatening employees with blacklisting because they engaged in protected concerted activity.

(c) Suspending and discharging its employees for engaging in protected concerted and union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act.

(a) Offer immediate reinstatement to employees Kelly Croshier, Susan Huls, Alice Downey, Zerna Van Bramer, and Palmela Parsons to their former positions of employment, discharging if necessary any employees hired to replace them, without prejudice to their seniority or other rights and privileges previously enjoyed, and remove from its records any reference to the unlawful suspension of Croshier

²⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and the unlawful discharges of all these employees and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(b) Make Kelly Croshier, Susan Huls, Alice Downey, Zerna Van Bramer, and Palmela Parsons whole for any loss of pay or other benefits they may have suffered as a result of Respondent's unlawful discrimination against them beginning July 29, 1991, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Lenox, Massachusetts, copies of the attached notice marked "Appendix."²⁶ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

²⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."